

*United States Court of Appeals
for the Second Circuit*



**BRIEF FOR
APPELLANT**

76-7493
ORIGINAL

*To be argued by
JOSEPH P. NAPOLI*

United States Court of Appeals
FOR THE SECOND CIRCUIT

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P/S

MAX HABER, as executor of the Goods, Chattels and
Credits that were of GEORGE HABER, Deceased, and
MAX HABER, individually,

Plaintiff-Appellant,

against

THE COUNTY OF NASSAU and ROBERT
SEHLMAYER,

Defendants-Appellees.

On Appeal from the United States District Court for
the Eastern District of New York

BRIEF OF PLAINTIFF-APPELLANT

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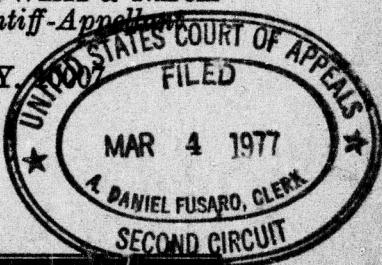


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Preliminary Statement

Plaintiffs are appealing from the judgment of Hon. Thomas C. Platt setting aside the verdict against the defendant, County of Nassau, and granting the motion of defendants, County of Nassau and Robert Sehlmeyer, for judgment notwithstanding the verdict and dismissing the complaint (A993).

In reviewing the Trial Court's decision to set aside the jury's verdict and dismiss the complaint this Court must

take into consideration the prevailing view in this Circuit, as enunciated in *Bigelow v. Agway*, 506 F 2d 551 (2d Cir. 1974) that:

"The non-moving party is given the benefit of all reasonable inferences from the evidence, and evidence unfavorable to it may be considered only if that evidence stands uncontradicted and unimpeached." *Id.*, at 554.

In *Fortunato v. Ford Motor Co.*, 464 F 2d 962 (2d Cir. 1972) the Court stated:

"In determining whether the motions for a directed verdict and judgment n.o.v. were properly denied, this Court must view the evidence most favorable to Fortunato and give him the benefit of all inferences which the evidence fairly supports, even though contrary inferences might reasonably be drawn. (Citations omitted) Taking that view of the evidence we must then decide whether or not reasonable men would return a verdict for the plaintiff." (Citations omitted) (at 965)

Also, in reviewing the Trial Court's decision, this Court must take into consideration the decision of the New York State Court of Appeals in *Roszman v. LaGrega*, 28 NY 2d 307 (1971) wherein the Court stated:

"There has been a noticeable reluctance by the court to apply strictly in death cases the doctrine of contributory negligence. The last time that the court was unanimous in holding a dead person negligent as a matter of law was almost 40 years ago in *Crough v. New York Cent. R.R. Co.*, 260 NY 227, 183 N.E. 372 (1932) and this was in a railroad crossing case, a type which fell into a special category of the law." At 305

Issues Presented

1. Did the jury properly find, as a question of fact, that Sgt. Sehlmeyer was liable for the wrongful death of George Haber when he used deadly physical force in beating George Haber with the butt of his loaded pistol and shooting and killing him?
2. Did the jury properly decide, as a question of fact, the issue of plaintiff's contributory negligence and the proximate cause of that alleged negligence in having LSD and marijuana?
3. Was the trial Court's holding; in granting a new trial, that his submission of the case to the jury as to the defendant County of Nassau was in effect an instruction that Sgt. Sehlmeyer was covered by a limited insurance policy; erroneous?

Trial Court answered questions 1, 2 and 3 in the negative.

The Relevant Facts

George Haber was a student at Rockland County Community College, worked in the college library, and worked after school at Rickles (A129, A131, A132).

His mother last saw him on Friday September 29th 1972 at about four (4) o'clock. She and her daughter picked George up at school, they had dinner and she dropped him off at a friend's house (A125).

George met with friends George Duquette and Robert Lewin at Duquette's home to go to the Nassau Coliseum for a concert (A670-671). At the Coliseum, George had marijuana and LSD (A672). There was no way of really telling how much marijuana George smoked (A674). In the middle of the second act George left (A676).

Donna Nelson testified that she went to the concert with her husband and friends and left the concert before hearing the last group perform (A85, A87). When she first came out of the building she saw a boy trying to get into the door. The Coliseum guards pushed him away and finally the guards "... picked him up, carried him to the parking lot and threw him out there" (A89).

Christina Moore, a witness who testified for the defendant was leaving the concert with her girlfriend Jody at about 11:00 p.m. A man was trying to get in the door. The guard pushed him out of the door and he walked away in a daze. He was on his stomach looking at people. He didn't seem normal (A723-725).

As they walked to their car two girls ran past them (A725).

Catherine Kragan testified that she and her girlfriend Joanie left the concert early at about 11:00 P.M. to meet their ride home. They were walking back towards the gate when she heard a door slam and she saw this kid running.

It was a boy about her height (A697). He came up to us looked at both of us and grabbed Joan by the arm. Kragan then dug her nails into his arm and he grabbed her by the rear (A697-698). She pushed him away without any difficulty and ran (A698, A708). Joan did not complain to her about any injury and it wasn't their intention to go for a police officer (A707, A710).

They told the police officer their story and "... ran off laughing about it" (A698-699). They did not follow the policeman (A699).

The police officer testified that the girls did not "... identify the man in any way". (Emphasis supplied) (A371)

Miss Kragan's testimony is self explanatory:

"Q. You weren't looking for a police officer when you pushed him away?

A. No, we weren't.

Q. This was pretty much of an *afterthought* when you saw the police car, to tell the police officer; true?

A. Right.

Q. And your conversation with the police officer took place, Ms. Kragan, how long after you left the sidewalk where you had encountered this young man?

A. Few minutes." (Emphasis supplied) (A710-711)

On September 29th, 1972 Robert Sehlmeyer was employed as a sergeant with the Nassau County Police Department (A14-15). On that day his hours of duty were from 3:00 P.M. till 1:00 P.M. or the completion of the traffic detail at the Coliseum (A25). That evening he was assigned to supervise the parking detail in the vicinity on the Nassau County Coliseum (A26). He knew that there was going to be a rock concert at the Coliseum and

his assignment involved the entire parking area and traffic detail surrounding Nassau County Coliseum (A30, A39).

At approximately 11:00 P.M. Sehlmeyer stopped his vehicle in the parking field just northeast of the Coliseum (A48). Two young ladies flagged him down (A52) who spoke to him and conveyed to him the impression that someone had attempted to grab one of them (A55). He drove his car into the aisle that the girls had pointed (A57). When he first turned into the aisle he observed someone walking easterly away from his car (A60). Sehlmeyer testified:

"I proceeded eastbound in the aisle. Stopped the car to the rear of the individual. I opened the door on the driver's side after putting the car in park. I got out of the car. I called to the individual. I told him to stop, and identified myself as a police officer. The individual continued to walk. He appeared even not to pay any attention to me or not hear me. I again called to him, told him to stop, again I identified myself as a police officer. He continued to walk. I started after him."

He identified himself to the individual, a young male about 20 years old, and told him to stop walking (A63-65). He caught up to George and told him he wanted to speak to him and to return with him to the patrol car (A66-67). George turned around and started to walk back to the patrol car with Sehlmeyer (68). Sehlmeyer walked slightly behind George holding his right arm with his left hand (A69).

Christina Moore also testified that upon leaving the Coliseum in her girlfriend's car, they saw a policeman and a boy in the middle of the road on the ground. The boy was behind the policeman and had his head on the policeman's shoulder (A728). The policeman asked her to go into his car and radio for help (A729).

She called for an Emergency 14 to the south side of the Coliseum and she showed the cop " * * * with how many fingers, how many cars were being called and how many cars were responding." She put up her fingers saying "4, 5, 6 cars" (A730). The policeman got up with the boy and they both walked over to the car. He asked her for a piece of paper that was on the car seat and took the receiver through the window with is arm around the boy, and spoke on the radio (A732).

Sgt. Sehlmeyer testified that when he got up with the boy he swung around and put a hammer lock on him (A420-421). He stated:

"As I got to my feet and the subject was behind me with his arms around my waist and chest area, I had my hands on top of his wrists. As I got up I was able to pry his hand off of my chest. I swung around and brought his arm around with me into a hammer lock in back of him." (A421)

He was standing to his rear, had the boy's arm bent and behind his back, applying pressure upwards, with his left hand on the boy's left shoulder (A422-423).

Although Sgt. Sehlmeyer was equipped with handcuffs he never attempted to cuff the boy and restrain his hands (A386, A425).

Sgt. Sehlmeyer testified: "I had intended to handcuff him when we got to the vehicle" (A426) but "we never reached the vehicle" (A425). *This testimony completely contradicts the testimony of Christina Moore, defendant's own witness, who testified that the policeman came over to the car, had a conversation with her and had a conversation on the radio.*

Allen Loeffler testified that he was in his car in the Nassau Coliseum parking lot on the night of September 29th, 1972 (A572).

He was driving down the aisle looking for a friend's car that had been in an accident when he came across a police car in the aisle (A573-574). He approached the car about 15 feet, stopped and noticed a policeman and a kid fighting on the ground. The policeman had a billy jack in his hand and the kid took it away from the cop and threw it between parked cars (A574). Loeffler also testified that:

"They were wrestling on the ground for maybe a minute and the cop was on the bottom and the cop got up and he brought the kid over to the car, the police car. And I saw a girl sitting in the car and he asked the girl to give him the mike so he could radio for help.

And while this happened he had the kid against the car with one hand and when he went to reach in to get the mike, the girl broke loose—the kid broke loose and he got in the police car. And the car was running and he put the gas pedal down to the floor.

And then the cop was yelling to him, get out of the car, get out of the car. And he reached in and he pulled him out of the car". (A575)

* * *

"And he had him on the side of the car and they were fighting for a while and the kid took a swing and hit the cop in the mouth. And then I saw a gun in his hand, the cop's". (A576)

The cop hit George on the top of his head with the gun butt and George held his head and was screaming for his mother (A576).

The cop was hitting George over the head with the gun but when Mr. Loeffler heard a shot go off which broke

the rear window of the car door (A576-577). George did not have his hands on the gun at anytime. He broke away from the cop and went to the rear of the car and he and the cop were ". . . kind of grabbing each other, trying to get a hold of one another".

"And I saw the cop take a *step back* and fire the gun. And I saw the kid go down". (Emphasis added) (A577, A596).

Donna Nelson was looking for her car when she saw a police car come up ". . . we were walking toward the police car we heard a shot". "We were near the police car now. The policeman had the boy . . . , he had him by the hair" (A90).

The boy broke away and the policeman grabbed him again by the hair and swung him around. The policeman had a gun in his right hand, he fired the gun and the boy fell to the ground (A91).

The bullet went through the left chest of George Haber and through his heart (A199, A202).

The gun Sgt. Sehlmeyer fired was a blue Colt Trooper, with a four (4) inch barrel equipped with an internal safety bar (A316-317).

Shortly afterwards members of the Police Department arrived (A472). They arrived a minute or two after George Haber was shot (A473).

The Trial Court's Charge

With respect to the police officer's use of deadly physical force the Trial Court charged that:

"Now, as to the second and fourth cause . . . , a police officer, when in the process of carrying out his duties, may use physical force where he rea-

sonably believes either his own life or the lives of those he is responsible to protect are in danger or that there is danger of physical injury.

The law holds that there is legal justification to use force in situations where the police officer reasonably believes that lives are in danger, or bodily harm is imminent, including his own.

Where the escape of the suspect is imminent or to effectuate a lawful arrest, the law also justifies the use of reasonable force.

If you find that the plaintiff became violent and dangerous while under the custody of Sergeant Sehlmeyer and that the defendant was either put in peril of his wife or threatened with bodily harm, or that the defendant reasonably believed that the public was threatened with bodily harm or threat to life, then the law justifies the defendant's use of force.

If you find that Sergeant Sehlmeyer used reasonable force under the circumstances, then you must return a verdict in favor of the defendants.

If you find that Sergeant Sehlmeyer was in the process of lawfully arresting the plaintiff or preventing his escape, then the law allows the use of force, reasonable force.

If you find that Sergeant Sehlmeyer reasonably used force under the circumstances, then your verdict may be for the defendants.

Now, Section 35.30 of the Penal Law provides—of the State of New York provides that a peace officer in the course of effecting or attempting to effect an arrest, or of preventing or attempting to prevent the escape from custody of a person whom

he reasonably believes to have committed an offense, may use physical force when and to the extent that he reasonably believes such to be necessary to effect the arrest, or to prevent the escape from custody or to defend himself or a third person from what he reasonably believes to be the use or imminent use of physical force except that he may use deadly physical force for such purposes only when he reasonably believes that regardless of the particular offense which is the subject of the arrest or attempted escape, the use of deadly physical force is necessary to defend the peace officer or another person from what the officer reasonably believes to be the use or imminent use of deadly physical force.

The definition of deadly physical force in the Penal Law means deadly physical force—means physical force which, under the circumstances in which it is used, is readily capable of causing death or other serious physical injury.

A deadly weapon is defined as any loaded weapon from which a shot, readily capable of producing death or other serious physical injury, may be discharged, or a switchblade knife, gravity knife, dagger, billy, blackjack, or metal knuckles.

But if you find from the preponderance of the evidence in the case that the defendant Sehlmeyer by some act or failure to act violated the provisions of such section of the Penal Law, such conduct in violation of the law is presumed negligent.

This presumption of negligence is not, however, conclusive, but may be overcome or outweighed by evidence in the case which satisfies your minds that, notwithstanding any failure to comply with the

provisions of the Penal Law in question, the defendant acted as a reasonably prudent person would have acted under all the surrounding circumstances in the case.

And you will bear in mind, of course, that a finding of negligence based upon a violation of law by a defendant will not justify a verdict in favor of the plaintiff unless the violation of law was a proximate cause of an injury or damage found by you to have been suffered by the plaintiff's decedent son." (A923-A926)

On the issue of plaintiff's contributory negligence the Trial Court charged:

"In addition to denying that any negligence of the defendants proximately caused any injury or damage to the plaintiff, the defendants allege as an affirmative defense that some contributory negligence on the part of the plaintiff's son himself was the proximate cause of any injuries and resulting damages that may have been sustained.

Contributory negligence is fault on the part of a person injured, which contributes in some degree with the negligence of another and so helps to bring about the injury.

By the defense of contributory negligence the defendant alleges that even though a defendant may have been guilty of some negligent act or omission which was one of the proximate causes, the plaintiff's son himself, by his own failure to use ordinary care under the circumstances for his own safety at the time and place in question also contributed to one of the proximate causes of any injuries and damages plaintiff may have suffered.

The plaintiff's son was required to exercise reasonable care for his own safety; that is, the same degree of care that a reasonable person would have exercised for his own safety under the circumstances. The law does not permit you to weigh the degree of fault of plaintiff's son or defendants, but requires that if you find the plaintiff's son was guilty of any negligence which proximately caused his death or injuries, your verdict must be for the defendants, even though you also find that the defendants were negligent.

In regard to the plaintiff's son, it is not important whether the negligence is great. But in regard to the plaintiff's son's negligence, it is not important whether the negligence is great or slight. Any failure to live up to the required standard is contributory negligence and shall entirely bar the plaintiff from recovery.

It is not the degree of contributory negligence that is important.

If you find then that George Haber's own acts contributed to his death and that he did not act as a reasonable man in exercising care for his own safety, then you must stop all deliberations and return a verdict in favor of the defendants. Since everyone is required to act with knowledge of what the law forbids and what the law requires to be done, the provisions of law set forth in the statute that are to be read to you are to be considered by the jury as one of the circumstances in evidence in the case surrounding the conduct of the plaintiff's son." (A926-929)

The Trial Court then defined for the jury within the contexts of contributory negligence the Penal Law defini-

tions of sexual abuse, reckless endangerment, menacing, assault second and third, escape second and third, robbery first degree, harrassment, criminal possession of a dangerous drug and attempt to commit a crime (A929-934). With respect to the issue of contributory negligence the Trial Court continued that:

"If you find from a preponderance of the evidence in the case that the plaintiff's decedent by some act or failure to act violated the provisions of one or more of the foregoing provisions of the law or statutes which I just read to you, such conduct and violation of the law is presumed negligent. This presumption of negligence is not, however, conclusive, but may be overcome or outweighed by evidence in the case which satisfies your minds that, notwithstanding any failure to comply with the provisions of law in question, the plaintiff's decedent acted as a reasonably prudent person would have acted under all the surrounding circumstances shown by the evidence in the case.

And you will bear in mind, of course, that a finding of negligence—in this case a finding of contributory negligence, based upon a violation of law by the plaintiff's decedent will not justify a verdict in favor of the defendants unless the violation of law was a proximate cause of an injury or damage found by him to have been suffered by the plaintiff's son.

And an injury or damage is proximately caused by an act or a failure to act whenever it appears from the evidence in the case that the act or omission played a substantial part in working about or actually caused the injury or damage and the injury or damage was either a direct result or a reasonable probable consequence of the act or omission." (A934-935)

The Trial Court's Post-Verdict Decision

In reading the Trial Court's decision, this Court should consider the language in *Tenant v. Peoria & Pekin Union R. Co.*, 321 U.S. 34, 35-6:

"It is not the function of a court to search the record for conflicting circumstantial evidence in order to take the case away from the jury on a theory that the proof gives equal support to inconsistent and uncertain inferences. * * * It [the jury] weighs the contradictory evidence and inferences, judges the credibility of witnesses, receives expert instructions, and draws the ultimate conclusion as to the facts. The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable * * * That conclusion, whether it relates to negligence, causation or any other factual matter, cannot be ignored. Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable."

The Jury returned a verdict in favor of the plaintiffs and against the defendants, County of Nassau and Robert Sehlmeyer, holding the defendants liable in negligence for the conscious pain and suffering and wrongful death of George Haber (A981).

In reversing the judgment against the defendant Sehlmeyer the trial court stated that:

"In addition, although there is no need to consider the matter in the light of the foregoing, there is a substantial question whether plaintiff proved any negligence, as distinguished from an assault

or intentional tort, on the one hand, or justifiable conduct in an emergency on the other, on the part of the defendant Sehlmeyer. Monday-morning quarterbacking may well be permissible in football, but it has no place in the law. As the New York Court of Appeals has repeatedly said (2 N.Y.2d at p. 67):

“When a defendant is faced with an emergency without opportunity for deliberation, thought or consideration, the ensuing accident may be within the field of nonliability for injury. Meyer v. Whisnant, 307 N.Y. 369, 121 N.E.2d 372; Prosser on Torts [2d ed.] §32, pp. 137-138.”

Rowland v. Parks, 2 N.Y.2d 64, 67, 156 N.Y.S.2d 834, 836 (1956);
Amaro v. City of New York, — N.Y.2d — (June 7, 1976);
Lowery v. Manhattan Ry. Co., 99 N.Y. 158, 1 N.E. 608 (1885).” (A992)

In dismissing the complaint the trial court stated that:

“Regardless of this recent development in the law, the Court had, prior to reading the Supreme Court’s opinion in the *Aldinger* case, concluded that it had erred in its submission of the case to the jury and should have granted defendants’ motion for a directed verdict on the ground that the proof as to George Haber’s contributory negligence being a proximate cause of the accident herein, was overwhelming and essentially uncontradicted, and that it barred plaintiff from a recovery herein. The jury’s contrary conclusion in this case has so shocked the conscience of this Court that it feels it cannot under any view of the facts sustain the same. (A987)

It is axiomatic that an individual must be held responsible for his own acts. In this case George Haber must be held responsible for 'spacing' himself 'out' and causing himself to lose control of his mind and actions, conduct and behavior. Any other result would be to condone, nay encourage, individuals in a belief that the law will not hold them responsible for their own acts (A989).

* * *

In the instant case it is true that the decedent may not 'knowingly and consciously (have) follow(ed) the precise path that (led) to death and destruction', but it is equally true that 'his conduct manifest(ed) a 'disregard of the consequences which (might) ensue from the act (of taking drugs), and indifference to the rights of others' (2 N.Y.2d at p. 139). There is no question but that such act was negligent (if not criminally or culpably negligent) and contributed to or was a proximate cause of the eventual accident herein." (A991)

POINT I

The jury properly found, as a question of fact, that Sgt. Sehlmeyer was liable for using deadly physical force when he beat George Haber with his loaded pistol and shot and killed him.

In reversing the jury's verdict and dismissing the complaint, the Trial Court ignored the principle of law stated in *Rodak v. Fury*, 31 AD 2d 816, 298 NYS 2d 50 (2nd Dept., 1969) that:

"In determining whether a *prima facie* case has been established in a wrongful death action, the

Court of Appeals has said "(1) that in a death case a plaintiff is not held to as high a degree of proof of the cause of action as where an injured plaintiff can himself describe the occurrence * * * [citing cases], and (2) that where the complaint has been dismissed, the evidence adduced at the trial is to be considered in the aspect most favorable to plaintiff and plaintiff is entitled to the benefit of every favorable inference which can reasonably be drawn from the evidence * * * [citing cases]" (*Andersen v. Bee Line, Inc.*, 1 NY 2d 169, 172, 151 NYS 2d 633, 634, 134 NE 2d 457, 458)."

The Trial Court also ignored the principle of law expressed by the Supreme Court of the United States and the decisions of this Circuit, that a Trial Judge cannot set aside a verdict merely because, if he were a juror he would have reached a different result. The Supreme Court in *Basham v. Pennsylvania R. Co.* (372 U.S. 699 at 700-701) stated:

"Only when there is a complete absence of probative facts to support the conclusion reached [by the jury] does a reversible error appear. But where, as here, there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion. And the appellate court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable."

In *Miceli v. Interressantskapet Sea Transport*, 413 F. Supp. 776 (DCNY, 1976) the Court stated at page 779:

"A motion under Fed. R. Civ. P. 50 (b) for judgment notwithstanding the verdict is to be granted

only where there is an absence of any substantial evidence to support the verdict. See 2B Barron & Holtzoff, *Federal Practice & Procedure* §1079. If reasonable minds could differ as to the proper outcome, regardless of where the weight of the evidence lies, the essential unanimity required for a judgment notwithstanding the verdict is lacking. See *Arteiro v. Coca Cola Bottling Midwest, Inc.*, 47 FRD 186, 187 (D. Minn. 1969)."

And at page 780:

"Our estimation of the evidence does not count, for this case was not tried to the court; it was tried before a jury. Certainly we appreciate most emphatically what the court in *Tyrill v. Alcoa Steamship Co.*, 185 F. Supp. 822 (S.D.N.Y. 1960), had to say on this score:

'The jury, and not the Court, is the ultimate fact-finding body, and as long as differing conclusions may reasonably be drawn from the evidence, its verdict may not be disturbed.' *Id.*, at 825."

And again at page 780:

"Further, we find particularly relevant what the Circuit Court had to say on this point:

'The practical effect (of the verdict) is that twelve jurors found contrary to the testimony of the three * * * witnesses, and certainly a juror has not only a right but a duty to use his common sense and experience and draw all reasonable inferences from the physical facts * * *.' *Compton v. United States*, 371 F. 2d 408, 412 (8th Cir. 1960)."

See also *Fortunato v. Ford Motor Co.*, *supra* and *Merced v. Autopak Co., Inc.*, 533 F. 2d 71 (2d Cir. 1976) discussed in Point II herein.

With respect to defendant's liability the Trial Court charged the jury that:

"* * * he may use deadly physical force for such purposes only when he reasonably believes that regardless of the particular offense which is the subject of the arrest or attempted escape, the use of deadly physical force is necessary to defend the peace officer or another person from what the officer reasonably believes to be the use or imminent use of deadly physical force."

In addition to the Penal Law there was proof in the record that there were departmental rules and regulations with respect to the use of deadly physical force, which the jury could have reasonably found as a question of fact, Sgt. Sehlmeyer had violated.

Donna Nelson and Christina Moore testified that the guards had no difficulty in pushing George Haber away when he tried to get into the door.

Catherine Kragan testified that she pushed George away when he grabbed her, without any difficulty. Sgt. Sehlmeyer testified that when George was holding him around the waist he was able to get to his feet, pry his hands off his chest, swing around and put George's arm into a hammer lock. It was at this point that Sgt. Sehlmeyer indicated, it was his intention to handcuff George. Instead of handcuffing George he brought him to the car, had a conversation with Christina Moore and spoke over the radio.

Alan Loeffler testified that the cop was hitting George on the head with the gun butt, that he heard a shot go

off, which broke the window of the police car; that George did not have his hands on the gun at any time and that "I saw the cop take a step back and fire the gun and I saw the kid go down."

Donna Nelson testified that the policeman had the boy by the hair, the boy broke away and the policeman grabbed him again by the hair and swung him around. The policeman had a gun in his right hand, he fired the gun and the boy fell to the ground.

Despite the law as charged by the Court with respect to the use of deadly physical force, the facts as proven and the inferences that can reasonably be drawn from those facts by the jury in the reduced standard to be applied in a death case, the Trial Court erroneously concluded that "• • • there is a substantial question whether plaintiff proved any negligence."

In holding that the plaintiff had not made out a *prima facie* case the Trial Court cited:

Rowland v. Parks, 2 NY 2d 64, 67, 156 NYS 2d 834, 836 (1956);
Amaro v. City of New York, 40 NY 2d 30 (1976);
Lowery v. Manhattan Ry. Co., 99 NY 158, 1 NE 608 (1885).

None of the above cited cases apply to the case at bar. *Rowland v. Parks*, *supra*, involved an action where the plaintiff was a passenger in a car driven by the defendant, which was proceeding lawfully on a roadway at approximately 15 to 20 miles an hour, when part of a tree fell from above, hit a wire and the tree struck the car. Based upon these facts the Court of Appeals found, as a matter of law, that plaintiff's evidence was insufficient to permit a jury to infer that the injuries were caused by the negligence of the defendant.

In *Amaro v. City of New York*, supra, the Court of Appeals held it was not error for the Trial Court to charge the emergency doctrine with respect to plaintiff's contributory negligence. The plaintiff, a New York City fireman, sustained serious injuries in responding to a fire alarm, when he fell in attempting to use the sliding pole. The plaintiff alleged that the defendant, City, was negligent in failing to maintain adequate lighting and guards at the pole hole.

Lowery v. Manhattan Ry. Co., supra, involved fire falling from a locomotive upon a horse attached to a wagon and upon the hand of the driver. The horse became frightened, ran away, threw the driver, and injured the plaintiff who was on the sidewalk. The Court held that the action of the driver, in view of the exigency of the occasion, might be considered as a continuation of the original act, and was a proximate and probable consequence of defendant's negligence.

In holding George herein contributorily negligent as a matter of law, the Trial Court quotes from *People v. Decina*, 2 NY 2d 133 (1956) at page 139:

"* * * The statute (Section 1053-a of the Penal Law) does not require that a defendant must deliberately intend to kill a human being, for that would be murder. Nor does the statute require that he knowingly and consciously follow the precise path that leads to death and destruction. It is sufficient, we have said, when his conduct manifests a 'disregard of the consequences which may ensue from the act and indifference to the rights of others. No clearer definition, applicable to the hundreds of varying circumstances that may arise, can be given * * *.'"

The law, as charged by the Trial Court, does not require that Sgt. Sehlmeyer knowingly and consciously fol-

lowed the precise path that led to his shooting and killing George Haber. It was sufficient for the jury to conclude that his conduct manifested a disregard and indifference to the rights of others.

As stated by the Trial Court:

“Monday morning quarter-backing may well be permissible in football, but it has no place in the law.”

Based upon the evidence and based upon the law as charged, to which the defendant took no exception, there was sufficient proof for the jury to hold the defendant liable for unreasonably using deadly physical force and causing the death of George Haber.

POINT II

The jury properly decided, as a question of fact, the issue of plaintiff's contributory negligence and the proximate cause of that negligence in having LSD and marijuana.

In *Roszman v. La Grega*, 28 NY 2d 307 (1971) the Court of Appeals stated at page 305:

“There has been a noticeable reluctance by the Court to apply strictly in death cases the doctrine of contributory negligence. The last time that the court was unanimous in holding a dead person negligent as a matter of law was almost 40 years ago in *Crough v. NY Cent. R.R. Co.*, 260 NY 227, 183 NE 372 (1932) and this was in a railroad crossing case, a type which fell in a special category of the law.”

“* * * Indeed, the general softening of the rigidities of the doctrine of contributory negligence in New

York may be seen in recent cases where the injured person is himself suing and thus has the burden of showing he was not negligent. (Citing cases)"

After a lengthy discussion of the history of the defense of contributory negligence, and the criticism of it as a defense, the Court stated at page 308:

"One basic inconsistency that has been noted is that there is a qualitative difference, when it comes to imposing liability on such a theory as tort, between one whose negligent act does harm to others and one whose negligent act does harm to himself, and the same mechanistic standard ought not to be applied undifferentiatedly as to both.

It would seem to follow, then, that on any fair analysis of New York law, the question of Rossman's contributory negligence in standing where he did to waive off traffic from the danger of the standing car would be for the jury. At least we ought not extend the perimeters of this unsatisfactory doctrine wider than we need to."

This Court as recently as April, 1976, in *Merced v. Autopak Co. Inc.*, supra, reversed the Trial Court's setting aside of a verdict for the plaintiff on the issue of the liability in a case where the plaintiff caught his hand in the machine he was operating, which was manufactured by the defendant. With respect to the issue of contributory negligence this Court stated at page 80:

"In New York the issue of contributory negligence is almost exclusively for the jury, *Wartels v. County Asphalt, Inc.*, 29 NY 2d 372, 379, 328 NYS 2d 410, 416, 278 NE 2d 627, 631 (1972) and as such ought not be overturned if it 'is, at least, reasonably arguable' that appellant was not contributorily neglig-

gent. *Roszman v. La Grega*, 28 NY 2d 300, 309, 321 NYS 2d 588, 595, 270 NE 2d 313, 317-18 (1971) ('we ought not to extend the perimeters of this unsatisfactory doctrine [contributory negligence] wider than we need to'). As a consequence we believe that under this set of facts appellant was entitled, as a matter of New York law, to a decision by a jury on the issue of contributory negligence. Thus the verdict of liability must stand."

In *Olsen v. NY Central RR Co.*, 341 F 2d 233 (2nd Cir. 1965) the plaintiff brought an action to recover for the death of a commercial fisherman who fell off the deck of a tug boat upon which he was a guest. Although the decedent was intoxicated at the time of the accident, the Court stated at page 235:

"Decedent's voluntary intoxication would not constitute contributory negligence as a matter of law. The question was properly submitted to the jury. See e.g., *Fardette v. New York & Stamford Ry Co.*, 190 App Div 543, 180 NYS 179 (Sup Ct. 1920), affd 198 App Div 943, 189 NYS 943 (1921), affd, 233 NY 660, 135 NE 959 (1922); *Keefer v. Daum*, 262 App Div 1044, 30 NYS 2d 507 (1941); see also *Duffy v. City of New York*, 16 Misc 2d 1015, 184 NYS 2d 1006 (Sup. Ct. 1958), modified and affd, 7 App Div. 2d 988, 183 NYS 2d 863 (1959)."

In *Rodak v. Fury*, 31 AD 2d 816, 298 NYS 2d 50 (2nd Dept. 1969) the Court stated at page 53:

Intoxication in itself is not negligence as a matter of law but may be considered by the jury with the other facts in the case (*Clarke v. City of New York*, 295 NY 861, 67 NE 2d 261; *Fagan v. Atlantic Coast Line R.R. Co.*, 220 NY 301, 115 NE 704, LRA 1917

E, 663; *Kenney v. Rhinelander*, 28 App Div 246, 50 NYS 1088; *Lynch v. Mayor, etc. of City of New York*, 47 Hun 524; *Olsen v. New York Cent. R.R. Co.*, 2 Cir., 341 F. 2d 233; Prosser on *Torts* [2d ed], §31, p. 127; 2 Harper & James, *Law of Torts* [1956 ed.], §16.7, p. 922-23; Restatement, *Torts*, 2d §283c, comment d; 38 Am. Jur., *Negligence*, §203.)"

In addition, the issue of proximate cause should also be considered by the jury. *David v. Granger*, 35 AD 2d 636, 312 NYS 2d 962 (3rd Dept. 1970).

See also *Coleman v. NYC Transit Authority*, 37 NY 2d 137 (1975).

The Trial Court, in dismissing plaintiff's complaint, within the context of George Haber's alleged contributory negligence, stated that: "a plaintiff to be barred from recovery where 'he consciously assumed the risk of the harm he ultimately suffered during the fight.'"

It was erroneous for the Trial Court to hold that the plaintiff as a matter of law assumed the risk of Sgt. Sehlmeyer using deadly physical force under the circumstances. *Assumption of risk was never pleaded as an affirmative defense and was never charged to the jury.*

The cases cited by the Trial Court which concluded that plaintiff as a matter of law, assumed the risk, are distinguishable from the case at bar.

In *Ruggerio v. Board of Education of City of Jamestown*, 31 A.D. 2d 384, 298 N.Y.S.2d 149 (4th Dept., 1969), the plaintiff, 17 years of age, knew he was not supposed to fight in the Locker Room, and deliberately prepared for a fight. The plaintiff, at any time, could have secured the intervention of the instructor in charge in the Locker Room, but instead elected a physical confrontation.

Also in *Jones v. Kent*, 35 A.D.2d 622, 312 N.Y.S.2d 728 (3d Dept., 1970), the infant plaintiff voluntarily and knowingly accepted the challenge to meet defendant in the Boys Room after class.

In *Utica Mutual Insurance Co. v. Amsterdam Color Works*, 284 App. Div. 376, 131 N.Y.S.2d 782 (1st Dept., 1954), the plaintiff/workman knew that it was standard practice to fill a drum with water before applying an acetylene torch. He did not do so, and did not remove the screw cap to vent the drum and equalize the pressure inside the drum with the pressure outside. The drum exploded when the workman applied the torch.

The doctrine of assumption of risk is based ". . . upon the plaintiff's assent to endure a situation created by the negligence of the defendant . . ." *McEvoy v. City of New York*, 266 App. Div. 445, 447, 42 N.Y.S.2d 746, 749, aff'd 292 N.Y. 654.

It is based upon plaintiff's consent to accept the risk and *look out for himself*. Restatement, Second, Torts, Section 496C(b).

In addition, as stated by *Prosser*, Law of Torts, Hornbook Series, Third Edition, page 464:

"The fact that the plaintiff is fully aware of one risk, as for example, that of the speed at which a car is being driven, does not mean that he assumes another of which he is unaware such as the failure of the driver to watch the road."

In the case at bar, George Haber did not assume that Sgt. Sehlmeyer would be negligent in using deadly physical force under the circumstances.

In *Kozman v. Trans World Airlines, Inc.*, 236 F. 2d 527, cert. denied 77 S. Ct. 327, 352 U. S. 953, 1 L. Ed. 2d 243,

and 77 S. Ct. 328, 352 U. S. 953, 1 L. Ed. 2d 243, the Courts stated:

"In the leading New York case of *Zurich General Accident & Liability Ins. Co. v. Childs Co.*, 253 N. Y. 324, 327, 328, 171 N. E. 391, 392, where, as here, plaintiff was not an employee of the alleged tort-feasor, Chief Judge Cardozo made a comprehensive statement of the law of assumption of risk, during the course of which he said: 'The question, therefore, is whether [plaintiff], leaping on the elevator, was so informed of the dangers inhering in the leap as to be placed in the position of one willing to encounter them.'

"The evidence here (which would have been substantially buttressed by the erroneously-excluded testimony of the custom to warn) was to the effect that Kozman was not informed of the warming up of the TWA plane. If on the basis of past experience he could expect to be warned, he can hardly be held to have assumed the risk of a sudden and unexpected warm-up." (Emphasis supplied.)

Assumption of risk is relatively unusual and it is not to be concluded in the first instance that the plaintiff has been willing to assume a specific danger. Thus the burden of proving assumption of risk is placed upon the defendant. Restatement, Second, Torts, Section 496G.

The plaintiff herein was neither a participant in nor a spectator at a sporting event.

As stated in 1955 *Annual Survey of American Law*, Part II, 31 N. Y. U. Law Rev. 351-352, Feb., 1956:

"Assumption of risk may have some legitimate place in sporting (spectator or participant) events, but, where highly dangerous instrumentalities are

involved, a too-ready invocation of the doctrine can only serve to encourage carelessness by those who are in a position to erect safeguards."

Cf. *Scala v. New York*, 200 Misc. 475, 102 N. Y. S. 2d 790 (Sup. Ct. 1951).

In *Friedman v. NBC Motorcycle Imports, Inc.*, 452 F. 2d 1215 (2d Cir. 1971), the plaintiff, a free-lance photographer, was employed to photograph, in motion, a new motorcycle. The plaintiff remained in a stationary position, while the motorcycle approached him at speeds of from 15 to 25 m.p.h. and veered off to pass 1½ to 2 feet from Friedman. On the fifth approach, the driver veered off too late, striking Friedman. The defendants argued that Friedman was guilty either of contributory negligence or assumption of risk, or both, as a matter of law. The Court held that there was no support for the claim of contributory negligence or assumption of risk as a matter of law, and that this issue was properly submitted to the jury.

The Trial Court's reliance on *People v. Decina*, 2 N.Y. 2d 133 (1956), is misplaced. The defendant had moved to dismiss the indictment on the grounds it did not charge a crime.

The Trial Court, omits quoting the Court's statement that:

"... How can we say as a matter of law that this did not amount to culpable negligence within the meaning of section 1053-a?"

How can the Trial Court say as a matter of law that the plaintiff was contributorily negligent within the meaning of the sections of the Penal Law as charged by him.

Based upon the facts of this case, and the law as cited, including the cases cited by the Court below, plaintiff's contributory negligence, and its proximate cause, were questions of fact for the jury.

POINT III

The Trial Court's holding that his submission of the case to the jury as to the defendant County of Nassau was in effect an instruction that Sgt. Sehlmeyer was covered by a limited insurance policy was erroneous and a new trial should not be granted.

The Trial Court in ordering a new trial stated that:

"Prior to the trial the defendant County of Nassau moved to dismiss all three claims on the ground of lack of jurisdiction. This Court granted said defendant's motion as to the first claim but denied it as to the second and third claims under the doctrine of pendent jurisdiction (411 F. Supp. 93 (D. N.Y. 1976)). Subsequent to the trial and verdict in this case the United States Supreme Court has in another case held the latter part of the Court's decision to be in error and that plaintiff's second and third state law claims are 'without the statutory jurisdiction' of this Court. *Aldinger v. Howard, et al.*, ____ U.S. ___, 44 LW 4988 (June 22, 1976). Accordingly, the verdict against the County of Nassau must be set aside and plaintiff's claims against said defendant must be and the same hereby are dismissed."

The Court cites no authority for this proposition and incorrectly assumes that the jury did not properly perform its duty and did not follow his instructions. He told

the jury that: "Anything you may have seen or heard outside the courtroom touching the merits of the case is not evidence and must be entirely disregarded. You are to consider only the evidence in the case." (A895-896).

He also told them to reach a verdict "regardless of the consequences" and that the case should be considered and decided" . . . as an action between persons of equal standing in the community, equal worth, and holding the same or similar stations in life" (A892). He also told them not to speculate (A945).

If what the Trial Court states in his decision is the law, no case against an employer and employee would be submitted jointly to the jury.

The Trial Court after the jury's verdict should not be permitted to speculate as to the purpose of a juror or jurors asking a question.

Dunn v. United States, 284 US 390, 394, 52 S Ct. 189, 76 L^{ed} 356, (1932);

Maher v. Isthmian S.S. Co. (2d Cir. 1958) 253 F2d 414;

Kingsport Util. v. Lamson (6th Cir. 1958) 257 F2d 553;

Bartholemew v. Universe Tankships (2d Cir. 1959) 263 F2d 437.

In fact, without objection by defendant the Trial Court answered the questions to the satisfaction of everyone (A970-974, A978-979).

In *Dunn v. United States* (supra), Judge Holmes stated on page 394:

"That the verdict may have been the result of compromise, or of a mistake on the part of the jury, is possible. But verdicts cannot be upset by speculation or inquiry into such matters."

CONCLUSION

The jury properly found as a question of fact that Sgt. Sehlmeyer was liable for the death of George Haber and that the contributory negligence of George, if any, was not the proximate cause of the unnecessary shooting and resulting death. Granting of a new trial and dismissal of the complaint should be reversed and the jury's verdict re-instated.

Respectfully submitted,

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services or three (3) copies of

the within Brief

hereby admitted this 4th Day

of March : 1977

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